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Supreme Court of the United States

OCTOBER TERM, 1956.

No. 642

NATHAN R. UNDERWOOD AND RICHARD M. MURRAY, JR.,

Petitioners,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioners contend that four questions are presented by this petition which would authorize the granting of a Writ of Certiorari (pages two and three of their petition). Basically, only three points are raised by these four questions and they are as follows:

1. Have the petitioners been denied the right of trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States?

2. Is the holding of the Court of Appeals for the Fifth Circuit in conflict with the holdings of other Courts of Appeal?

3. Did the action of the Court of Appeals so far depart from the "accepted and usual course of judicial proceedings" as to call for an exercise of this Court's power of supervision under Rule 19(b) of this Court?

While these questions couch three legal principles which we will discuss later, primarily the petition is an emotional appeal rather than an exposition of legal principles. The petitioners have glossed over the facts, to such an extent that it is difficult to grasp properly the point at issue. While this court is not primarily concerned with the facts, we feel that a short statement of the evidence will clearly demonstrate that the decision of the court below was correct.

STATEMENT OF FACTS.

This accident happened at about 8:30 o'clock at night. The north-bound sixteen-car freight train had stopped about 30 feet south of a highway crossing for a switching movement. As the train started up and moved over the crossing, it is undisputed that it gave all proper signals. After the train had moved forward nine carlengths, the petitioners' car ran into the side of the train, hitting the ninth car back of the engine. Petitioners approached the crossing from the left at a point where the highway

was virtually straight for several hundred feet. As Judge Cameron points out (page 35 of Petition):

> "The evidence here shows without dispute that the concrete highway upon which appellees approached the point of collision was substantially level (1.13 percent grade); that the curve to the left was very slight (1°30′) and reached a straightaway 222 feet from the railroad track; that appellees faced a reflective type crossing sign, two and one-half feet in diameter with the top five feet from the ground, 675 feet from the crossing and the regular Mississippi Stop Sign 56 feet from the crossing, both of which signs were, by the slight curve, thrown directly into the rays of the car headlights."

The engine had attained a speed of 15 m.p.h., and starting from a dead stop, it, of necessity, could not have averaged 10 m.p.h. Petitioners admit that their speed was 60 m.p.h. or at least six times as fast as the speed of the train. Petitioners accordingly must have been about one-half mile away from the crossing when the engine moved over it.

Murray, who was driving petitioners' car, admits that his automobile was in perfect running order with good headlights and that he saw the train when he was approximately a half city block from the crossing, that he did not try to stop, but under the impression that it was a wagon in the road, he swerved to pass around the wagon. He did not put on brakes until he was right on the train.

There is no claim that the respondent was guilty of any negligence in failing to give the statutory signals before passing over the crossing. The only claim of negligence is based upon the last clear chance doctrine, upon the contention that the engineer who was sitting on the side of the cab opposite the side into which petitioners drove their car should have seen the approaching car, should have realized that the petitioners were not going to stop, and should have given a warning blast of the whistle or should have rung the bell. As will be demonstrated hereafter, the Mississippi Supreme Court does not uphold liability on any such theory.

It is interesting to note that each one of the Mississippi Judges who has had occasion to pass upon the case—Judge Mize who directed the verdict for the Respondent on the first trial, Judge Holmes who dissented on the first appeal, and Judge Cameron who wrote the opinion in the second appeal—has held that there was no liability on the respondent under Mississippi law.

PROPOSITIONS OF LAW AND AUTHORITIES.

I.

The Petitioners have not been Deprived of any Rights Under the Seventh Amendment to the Constitution.

When this case was tried in the District Court, at the conclusion of all of the testimony, the respondent made a motion for a directed verdict which was not granted. A

jury verdict in favor of each of the petitioners was returned and thereafter within the time provided by Rule 50(b), the Respondent filed its motion for a judgment N.O.V. and in the alternative filed a motion for a new trial. Both of these motions were denied by the trial court but on appeal the Fifth Circuit reversed and rendered judgment for the Respondent.

Basically, the contention of petitioners that their rights under the Seventh Amendment have been denied is that the Court of Appeals was without any authority to reverse and render, and that its power was limited solely to reversing and remanding the case to the trial court for a new trial, and for authority therefor relies almost solely on the case of *Slocum vs. N. Y. Life Ins. Co.*, 228 U.S. 264, 33 S.Ct. 523, 57 L. Ed. 879. This Court has repudiated the *Slocum* case in the later case of *Baltimore and Carolina Line vs. Redman*, (1935) 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636, and, as pointed out by Mr. Justice Black in the case of *Johnson v. New York, N.H. & H. R. Co.*, 344 U.S. 48, 51, the confusion caused by the *Slocum* case was the reason for the promulgation of Rule 50(b). What the petitioners are now asking this Court to do is to amend or modify its own Rule 50(b) and to reduce the power of reviewing courts. The refusal of this Court to amend the rule, even at the instance of the advisory committee in 1946, would indicate that the Court is satisfied with the present wording and effect of the rule. Quoting from Mr. Justice Black in the *Johnson* case, *supra*,

> "Rule 50(b) as written and as construed by us is not difficult to understand or to observe. Rewriting the rule to fit counsel's unexpressed wants and in-

> tentions would make it easy to reintroduce the same type of confusion and uncertainty the rule was adopted to end. In 1946 this Court was asked to adopt an amendment to the rule which would have given appellate courts power to enter judgments for parties who, like this respondent, had made no timely motion for judgment notwithstanding the verdict. We did not adopt the amendment then. 5 Moore, Federal Practice (2d ed 1951) 50.01 (7), 50.01 (9), 50.11. No sufficiently persuasive reasons are presented why we should do so now under the guise of interpretation."

See also the case of *Cone vs. West Virginia Pulp and Paper Company,* (1947) 330 U.S. 212, 67 S.Ct. 752, 91 L.Ed. 849.

The holding of this Court is entirely consistent with the Mississippi practice as is shown by the case of *Hattiesburg Chero-Cola Bottling Company vs. Price,* 141 Miss. 892, 106 So. 771, in which that court held:

> "The judgment in this case will have to be reversed, and judgment entered here for appellant. Taking the evidence most strongly for appellee, it falls short of tending to establish a case of liability on the part of appellant. There was, therefore, no question for the jury."

To the same effect see *Yazoo and Mississippi Valley Railroad vs. Polk*, 104 Miss. 339. 61 So. 450, and *Vincent, et al. vs. Barnhill, et al.*, 203 Miss. 40, 34 So.2d 363.

When the facts are not in dispute, as here, it is the duty of the trial court to direct a verdict as Mr. Justice Frank-

furter in *Wilkerson v. McCarthy*, 336 U.S. 53, at p. 65, said:

> "* * * The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge."

Mr. Justice Parker, in *Virginian Ry. Co. v. Armentrout*, 166 F.(2d) 400 (4th C.C.A.) at p. 408, said:

> "The power and duty of the trial judge to set aside the verdict under such circumstances is well established, the exercise of the power being regarded as not in derogation of the right of trial by jury but one of the historic safeguards of that right. * * * 'It is a power to examine the whole case on the law and the evidence, with a view to securing a result, not merely legal, but also not manifestly against justice—a power exercised in pursuance of a sound judicial discretion, without which the jury system would be capricious and intolerable tyranny, which no people could long endure. This court has had occasion more than once recently to say that it was a power the courts ought to exercise unflinchingly."

An examination of the foregoing cases will demonstrate that the Seventh Amendment deals with substance and not form, and if, as a matter of law, there is no factual issue for the jury to determine, a directed verdict should be entered by the trial court upon proper motion made. The former common law practice of reserving decision on the motion for a directed verdict as a pre-requisite to

entering judgment notwithstanding the verdict is no longer necessary under the provisions of Rule 50(b). Where, as here, the respondent has made a motion for a directed verdict and has later tendered a motion for a judgment N.O.V. at the conclusion of all of the testimony, which motions have been denied, he may press this point on appeal, and if the court of appeals finds, as it has here, that either motion should have been granted by the trial court, it is within the province and the power and it is the duty of the court of appeals to reverse and render, and such action is not a "redetermination" of any issue of fact under the provisions of the Seventh Amendment.

Rule 50(b), as adopted and interpreted by this Court, does not deprive these litigants of the right of trial by jury as guaranteed by the Seventh Amendment.

II.

The Holding of the Court of Appeals for the Fifth Circuit is not in Conflict with the Holdings of Other Courts of Appeal.

Petitioners assert (Page 15 of Petition) that the Court of Appeals for the Fifth Circuit in effect said: "An ex parte experiment conducted by an interested litigant must, as a matter of law, control over the sworn testimony of the actual witnesses." Petitioners then allege that such assumed holding is in conflict with the holding of the Fourth Circuit in the case of *Baltimore & Ohio R. Co. v. Deneen*, 167 F. (2d) 799, and with the Seventh Circuit case of *Lever Bros. Co. v. Atlas Assurance Co.*, 131 F. (2d)

770. In this they are in error. The statement of the proposition is itself erroneous as the Court made no such holding. The "experiment" was not conducted by interested litigants but was conducted by one McCullough, who was an employee of the respondent but not a litigant, and by Mobley, who was also an employee of the respondent but not a litigant. Mobley was a witness for the petitioners since they placed his deposition in evidence and rely thereon as a part of their testimony in chief. Nor does the experiment conflict with the "sworn testimony of the actual witnesses". The measurements which were made by Mobley and McCullough were directed toward the ascertainment by a definite means of the exact point on the highway at which the car occupied by the petitioners could first be seen. There was no direct testimony introduced by the petitioners as to just how far their car was north of the crossing at the time it was first seen by the train crew. At best, the evidence introduced by petitioners was a wild "guess" as to where the car was located. This guess gave way to the subsequent measurements which were made by McCullough and Mobley which pinpointed to a very high degree of accuracy the exact location of the automobile on the highway at the time when Mobley could first have seen the car.

> "The testimony even of a disinterested and unimpeached witness on the subjects of measurements, distances and the like, which is based merely on memory, estimate or casual observation, must yield to that which is based on actual measurement." *S. H. Kress and Co. vs. Sharpe*, (1930) 156 Miss. 693, 12 So. 650, 651; and see *Hardaway Contracting Co.*

vs. Rivers, (1938) 181 Miss. 727, 180 So. 800; *M. & O. R.R. Co. vs. Bryant*, (1931) 159 Miss. 528, 132 So. 539.

"For purposes of diversity jurisdiction a Federal Court is 'in effect, only another court of the state.'" *Guaranty Trust Co. vs. York*, 326, U.S. 99 108, 89 L.Ed. 2079, 2085, 65 S.Ct. 1464, 160 A.L.R. 1231; *Madisonville Traction Co. vs. Bernard Mining Co.*, 196 U.S. 239, 253, 49 L.Ed. 462, 468, 25 S. Ct. 251; *Ex Parte Schollenberger*, 96 U.S. 369, 377, 24 L.Ed. 853, 854.

In the case of *Angel vs. Bullington*, 330 U. S. 183, 91 L.Ed. 832, this Court announced the following rule:

"The essence of diversity jurisdiction is that a federal court enforces State law and State policy. If North Carolina has authoritatively announced that deficiency judgments cannot be secured within its border, it contradicts the presuppositions of diversity jurisdiction for a federal court in the State to give such a deficiency judgment. North Carolina would hardly allow defeat of a State-wise policy through occasional suits in a federal court. What is more important, diversity jurisdiction must follow State law and policy. A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld. Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens."

Paraphrasing the *Angel* case it would certainly be incongruous to say that, though the measurements made by

Mobley and McCullough would be binding and conclusive, if this litigation had been prosecuted to a conclusion in the Mississippi State Courts because the litigation was tried in the Federal Court a contrary result should be reached.

Nor is the holding of the Fifth Circuit in the instant case in conflict with the two Circuit Court cases mentioned by Petitioners in their brief In the case of *Baltimore and O.R. Co. vs. Deneen*, 167 F.2nd 799, a crossing accident was involved and the plaintiff's claim was based solely on the defendant's failure to fulfill its statutory duty of keeping the crossing in proper repair and the alleged causal connection of this failure with the injury to the plaintiff. Numerous witnesses testified for the plaintiff that the crossing was bad. In the face of this overwhelming testimony the Court of Appeals held "there was ample evidence to take to the jury the question of whether defendant lived up to a statutory duty to maintain the crossing in proper condition. Clearly this was a dangerous crossing."

In an effort to overthrow this direct testimony the defendant B. and O. Railroad introduced certain evidence the nature of which is not set forth in the court's opinion, but in disposing of this effort the court made the following ruling:

> "Evidence, quite technical in nature, was introduced by the defendant railroad in an endeavor to show that, with the plaintiff's car in the position it occupied at the time of the accident, the condition of the crossing did not cause the stopping of the plain-

> tiff's automobile, and thus defendant's negligence in this connection had no causal connection with the accident. The weight to be given to this testimony, *with the attendant power to resolve any conflicts here between the evidence of the plaintiff and that of the defendant, was peculiarly in the province of the jury.* (Italics ours.)

Thus it will be seen that in the *Deneen* case there was a sharp conflict of testimony on the very point in issue. Plaintiff's positive testimony in that case is entirely unlike the "guess" in the instant case.

Nor is the case of *Lever Bros. Co. vs. Atlas Assurance Co.*, 131 F.2d 770, cited by Petitioners applicable to the case at bar. The *Lever Bros.* case involved a suit on an insurance policy covering loss or damage by explosion. A large tank belonging to Lever Bros. burst causing extensive damage, and the suit followed. Three distinguished and well qualified chemical engineers introduced by the plaintiff testified that the tank was caused to burst by an explosion occasioned by the presence in the bottom of the tank of a quantity of water that became superheated by the coils in the bottom of the tank and flashed into steam, which generated great power that liberated itself by wrecking the tank. The defendants produced equally well qualified experts who testified that the catastrophe could not have happened as testified to by plaintiff's experts. The plaintiff testified that approximately four months prior to the explosion certain contents of the tank which later exploded had been pumped out and that a substantial percentage of water was found in the bottom of the tank. The defendants objected to this testimony on

the theory that the conditions surrounding the tank on this prior occasion were not substantially similar to those on the occasion under inquiry. In rejecting this objection the Court of Appeals made the statement which appears on page 61 of petitioners' supporting brief. In view of the sharp conflict in the testimony as to the effect that water in the tank may have had in causing the explosion, certainly such testimony was vital and should have been admitted and, in view of the sharp conflict of testimony, it was, under these conditions, a question for the jury, or as Mr. Justice Minton said "under all circumstances" it was for the jury. In the instant case there is no conflict of testimony as to the vital point in issue which was "where was the car when it was first seen by Mobley."

This was clearly pointed out by Judge Cameron in writing the opinion below as follows:

> "The facts established by the maps, photographs, and actual measurements demonstrate, therefore, that Engineer Mobley had only two to four seconds to act effectively to prevent the collision after his first glimpse of the car. He testified that he saw the car only as it flashed by the fireman's window and passed out of his sight. He called to Brakeman Gibson, who was occupying the fireman's seat on the side of the engine towards the road, and asked if the car was going to stop. Gibson, who was keeping a lookout ahead as required by his duties, had to turn around and look backward along his train and he saw that the car was too close to the train and was moving so fast that it could not be brought to a stop, and he replied with an immediate 'No.'. From this

it is clear that the automobile had passed the 'point of no return,' 226 feet, when the engineer received the warning."

III.

There has been no Departure by the Court of Appeals from the Accepted and Uusual Court of Judicial Proceeding.

Petitioners assert that the opinion of the Court of Appeals on the first appeal reported in 205 F.2d 61 has become the "law of the case" and that as a consequence the Court of Appeals on the second appeal, as a matter of form, should have simply affirmed the jury verdict rendered in the instant case. This, to say the least, is a novel claim, especially since the record in the two cases are so dissimilar.

The decision in the first appeal was based upon a record which consisted only of the petitioners' evidence. On the second appeal the appellate court had before it the entire record consisting both of the Petitioners' testimony and the Respondent's testimony. At the threshold of the opinion rendered by Judge Cameron the great variance between the record on the first and second appeals was clearly highlighted.

> "In this case the testimony of appellees was somewhat different from what it had been in the first trial, all of the members of the train crew testified, both on direct and cross-examination, showing full performance of the duties laid upon them by law; the engineer amplified the testimony he had given on *ex parte* examination by appellees' attorney; and,

in addition, evidence was admitted without objection of experiments conducted by engineer Mobley and others which demonstrated that it was physically impossible for him to see appellees' car at a sufficient distance from the point of collision to warrant the finding that it was reasonably probable that the engineer could have done anything to prevent the accident. This experimentation and the measurements developed by it furnished by far the most important additional evidence and will be discussed fully below."

But notwithstanding this difference between the record on the two appeals, petitioners say that the Court of Appeals in the second hearing should have been completely bound by the "law of this case as established in Judge Rives' opinion". They cite as authority for this contention *Thompson vs. Maxwell Land Grant and R. Co.*, 168 U. S. 451, 42 L.Ed 539. A more recent discussion of this rule is found in the very able opinion by Mr. Justice Holmes rendered in the case of *Messinger vs. Anderson*, (1912) 225 U.S. 436, 56 L.Ed. 1152, as follows:

> "In the absence of statute the phrase, 'law of the case' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. King v. West Virginia, 216 U. S. 92, 100, 54 L.Ed. 396, 401, 30 Sup. Ct. Rep. 225; Remington v. Central P. R. Co., 198 U. S. 95, 99, 100, 49 L.Ed. 959, 963, 25, Sup. Ct. Rep. 577; Great Western Teleg. Co. vs. Burnham, 162 U. S. 339, 343, 40 L.Ed. 991, 993, 16 Sup. Ct. Rep. 850."

In the *Messinger* case it is of interest to note that the precise question involved was the construction of a will as it affected lands in the State of Ohio. The *Messinger* case went three times to the Court of Appeals. Pending the proceedings in the federal case, another case was tried in the State courts between the same parties concerning other parcels of land in Toledo, depending on the same title in which the Supreme Court of Ohio construed the will differently from the construction that had been placed thereon by the Circuit Court of Appeals. In holding that the construction put upon the will by the Ohio Supreme Court decision should be followed rather than the construction put upon the will by the Circuit Court of Appeals, the Supreme Court made this observation:

> "In our opinion, even apart from the effect of the state judgment as an adjudication, it should have been followed, if for no other reason, *because, at least, as against the decision of the circuit court of appeals, it was right.*" (Italics ours.)

An examination of Shepard's United States Citations fails to reveal that the *Messinger* case has been in any way limited or modified, as related to the law of the case doctrine. We feel that this ruling is especially important in this case in view of the many decisions of the Mississippi Supreme Court upholding the conclusive effect of measurements as against opinion testimony of the type referred to earlier in this brief and also discussed at length by Judge Cameron in his opinion in the Court below.

The other cases decided by this Court and cited by petitioners on page 17 of their petition in support of their contention that the first opinion delivered by Judge

Rives is in effect *res judicata* actually have no application to the issues here involved, and are easily distinguishable from the case at bar.

IV.

The Court of Appeals in the Opinion Reported 235 F.2d 868 was Correct.

We have previously outlined the facts surrounding this accident. They are almost identical with the facts involved in the case of *Spilman vs. Gulf and S. I. R. Co.*, 173 Miss. 725, 163 So. 445. In the *Spilman* case the accident occurred by reason of Spilman running into the ninth car of a string of flat cars which was moving across a highway. The plaintiff sued in that case on two counts, one the failure to give the statutory bell and whistle signals, and second, the common law duty of the railroad to have given some warning upon or at the crossing in addition to the signals required by statute. In disposing of these contentions the Mississippi Supreme Court announced the following rule:

> "In law, when anything is said to be sufficient, it means that nothing else is required. Since, therefore, the entire crossing was occupied by the railroad cars and had been for a sufficient length of time for a person to see them and to stop before colliding therewith, the said presence of the cars was all the warning thereof that was required, and thereupon the statutory warning by bell and whistle became relegated to the position of actual and legal remoteness, with the result that the failure to give the statutory signals became the remote, and not the proximate, cause, and that the negligence of the plaintiff was the sole proximate cause of the collision,

as was held by the learned trial judge. Any other conclusion would lead to the result that, to avoid the charge of concurrent negligence, the whistle would have to be sounded or the bell kept ringing continuously all the while that any part of a train is upon the crossing, regardless of the length of time thereof. A freight train a half a mile long or more would have to give the signals continuously until the last car had passed over the crossing, which would require a bell and whistle of such construction as to be heard a half a mile or more, whereas the statute requires, as to this, only three hundred yards.

"As to the second count, averring that it was the duty of the railroad to have given some warning upon or at the crossing in addition to the signals required by statute, we add only that, as held in Gulf, M. & N. Railroad Co. v. Holifield, supra, no such additional warnings are required, in the absence of some peculiar environment, and so all courts hold. And, as explained in So. Ry. Co. v. Lambert, supra, and similar cases, the peculiar environment which is referred to means some peculiar condition of hazard which reasonable prudence should have reasonably foreseen would likely lead to a collision, notwithstanding ordinary care on the part of the driver of the motor car. But the conditions of peculiar hazard relied on here by appellant are no more persuasive than those urged in the Holifield case, wherein relief was denied. The judgment must therefore be affirmed on both counts."

What is there in this record to show that Murray would have heeded the sound of a whistle, if additional blasts had been blown? At 300 feet, his lights were on the moving freight train, but he was paying no attention for he

saw nothing—just as he had not seen the Railroad crossing sign 675 feet from the intersection, and just as he did not see the Stop Law Sign. When he did see something at 150 feet away (R. 81) he testified that he merely swerved and without reducing speed drove blindly into the side of the train. It would be purest conjecture to say that additional whistle blasts would have prevented this accident.

We submit that the result would have been the same as that in *New Orleans & N. E. R. Co. v. Burge*, 191 Miss. 303, 2 So.(2d) 825, wherein the Court had this to say:

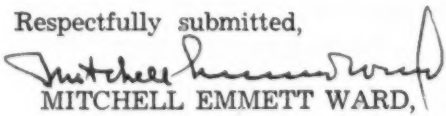
> "* * * To say on the record in the present case that had the required signals been given the injury would not have occurred is to invoke a possibility or conjecture, and it is not within the legitimate province or power of a jury to convert a possibility into something more by the mere force of a verdict. Teche Lines, Inc. v. Bounds, 182 Miss. 638, 649, 179 So. 747. To thus convert, what, on the facts, is no more than a possibility into something more would be to allow an arbitrary exercise of power by an agency employed in government, and in that connection due process must be remembered as a primary constitutional mandate. In view of what is disclosed by this record taking all that the plaintiff says as true together with the undisputed physical facts it is clear as a matter of all reasonable likelihood that appellee would not have heard the bells if two instead of one had been rung. The facts amount practically to a demonstration that he was both deaf and blind to everything except what he himself was doing, his sensibilities were in an evident state of unresponsiveness to all else; and thus the failure to ring the bell—and that was all that appellant was required to do—

disappears as a substantial factor in bringing about the injury; hence appellee cannot recover. . ."

CONCLUSION.

We respectfully submit that for the reasons hereinabove stated and on this record the three points raised by the petitioners must be answered in the negative and the writ should not be granted.

Respectfully submitted,



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